(1) Supreme Court, U.S.
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No. 00-418 SEP 11 2000

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IN THE

Supreme Court of the United States

WILDENSTEIN & CO., INC.,
Petitioner,

vs.

GILBERT M. MICHAELS, individually,
and doing business as VISAGE FINE ART,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The 1990 supplemental jurisdiction statute, 28 U.S.C. § 1367(d), requires that any state statute of limitations on a state cause of action shall be tolled while it is pending in federal court and for a period of 30 days after it is dismissed, unless state law provides a longer tolling period. In this case, the federal court dismissed the state causes of action. The questions presented are:

1. Whether Congress has power under Article III and Article I, § 8 of the Constitution, consistent with the Tenth Amendment, to toll state statutes of limitations on state causes of action to be heard in state court.

2. Whether Congress has power under Article III and Article I, § 8 of the Constitution, consistent with Article IV, § 4, which guarantees each state a "Republican Form of Government," to toll state statutes of limitations on state causes of action to be heard in state court.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case. Wildenstein & Co., Inc. is owned by Said Overseas Ltd. and Killeen Overseas Ltd., and it has one non-wholly owned subsidiary, 19 East 64th Street Corporation. See Sup. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Wildenstein & Co., Inc. ("Wildenstein & Co."), respectfully submits that a writ of certiorari should issue to review the opinion of the Court of Appeal of the State of California entered in this proceeding on March 30, 2000. A petition for rehearing was denied on April 20, 2000. The California Supreme Court denied a petition for review on June 14, 2000.

OPINIONS AND ORDERS BELOW

The opinion of the California Court of Appeal, and its order denying rehearing, are unreported and are reprinted in the Appendix ("App.") as Apps. A and B, respectively. The order of the California Supreme Court denying review (App. C) was entered without opinion and is unreported.

JURISDICTION OF THIS COURT

The California Court of Appeal's opinion of which petitioner seeks review was filed on March 30, 2000, and its order denying a timely petition for rehearing was filed on April 20, 2000. Apps. A and B. The California Supreme Court denied a timely petition for review (App. C) on June 14, 2000. This petition is timely filed within 90 days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved in this case is subsection (d) of 28 U.S.C. § 1367 (App. F), which provides:

> The period of limitation for any claim asserted under subsection (a) . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

The provisions of the United States Constitution involved include the Tenth Amendment, which states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Also involved are the Guarantee Clause in Article IV, § 4, which states that "[t]he United States shall guarantee to every State . . . a Republican Form of Government . . .," and Article 1, § 8, cl. 18 (App. G).

STATEMENT OF THE CASE

A. Introduction

The state law causes of action which gave rise to this case arose from a series of sales by Wildenstein & Co., a New York private art dealer, of two paintings by Renoir and two by Marquet. The aggregate sales price was over $2.5 million, with the sales taking place between 1989 and 1991. The buyer, a Beverly Hills art dealer, sued Wildenstein & Co. in no less than seven complaints in four courts, claiming that he paid too much. The federal court complaints, one based on federal question and the other on diversity jurisdiction, were dismissed, as were the state causes of action. In 1999, Wildenstein & Co. obtained summary judgment on the state causes of action based on California's two and three year statutes of

limitations. On appeal, the judgment was reversed due to the tolling provision contained in 28 U.S.C. § 1367(d), which is part of the Judicial Improvements Act of 1990 (Pub. L. 101-650). Section 1367(a) provides that when a federal district court has original jurisdiction over a civil action, it may also exercise "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of such case or controversy[.]" Subsection (d) tolls state statutes of limitations for state causes of action to be heard in federal or ultimately in state court, even though the actions may be stale under the state's law. The California Court of Appeal, with review denied by the California Supreme Court, rejected Wildenstein & Co.'s constitutional challenge to this tolling provision.

Respondent Gilbert M. Michaels, doing business as Visage Fine Art, filed his seven complaints against Wildenstein & Co. between 1993 and 1997. Even though he never validly invoked the federal court's jurisdiction, in March 2000 he was able, under 28 U.S.C. § 1367(d), to obtain an opinion allowing him to pursue state causes of action in state court that were stale under California's two and three year statutes of limitations.

Michaels was in the business of purchasing fine art works for the purposes of resale. His strategy was to buy art at the lowest possible price, and then to sell the paintings quickly, for a profit. Instead of buying wholesale, Michaels chose to buy retail from another dealer and in fact a competitor, Wildenstein & Co. As a retailer of artwork, Wildenstein & Co. sells

paintings by European Masters, as well as by Impressionist and Post-Impressionist painters.

Beginning in October 1989 and ending in May 1991, Michaels purchased four paintings from Wildenstein & Co. The art market, however, fell dramatically during the worldwide recession of the early 1990's. Michaels opened an art gallery at a Beverly Hills hotel, but he was not able to sell the four paintings, and they apparently fell in value. Becoming suspicious, Michaels arranged for appraisals. Around August 25, 1992, he received the first set of estimates from Christie's auction house, estimates that left him in "a state of shock." Michaels concluded he had been defrauded out of millions of dollars.

B. Trial Court Proceedings

Michaels sued Wildenstein & Co. three times. He began with an action in the United States District Court for the Central District of California, filed on June 28, 1993 under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In October, 1993, he filed a first amended complaint, again based on RICO, and also alleged supplemental jurisdiction causes of action under California law. Wildenstein & Co. moved to dismiss and, in the alternative, to transfer the case to the Southern District of New York. The District Court granted the transfer motion.

By December, 1993, Michaels' case became active in the Southern District of New York. The District Court required Michaels to file a RICO statement by May 24, 1995. Michaels never did. As the District Court noted, Michaels had chosen to file his lawsuit in federal court, but when the judge pressed him "to

fill out a RICO case statement," it became apparent that he "really didn't have a federal claim." Instead, he delayed and then voluntarily filed a second amended complaint in June of 1995. This pleading, which deleted the RICO claim and the California causes of action, alleged claims under New York law premised on diversity jurisdiction. Wildenstein & Co. moved to dismiss for lack of subject matter jurisdiction. Michaels again delayed and did not proceed with an evidentiary hearing suggested by the District Court to determine diversity jurisdiction. The District Court dismissed his second amended complaint for lack of diversity jurisdiction on October 6, 1995.

Returning to California, Michaels filed this second lawsuit in Los Angeles County Superior Court on October 24, 1995, alleging causes of action under California law. After Michaels filed a second amended complaint, Wildenstein & Co. successfully demurred to his breach of contract and statutory unfair competition and unfair practice claims.

On May 1, 1997, Michaels filed a third lawsuit against Wildenstein & Co. in the New York Supreme Court, under New York law, ostensibly to protect himself in the event the California case was dismissed. This was the seventh complaint that Michaels filed: two in the Central District of California, one in the Southern District of New York, three in Los Angeles County Superior Court, and one in the New York Supreme Court.

In December 1997, Wildenstein & Co. moved for summary judgment in Los Angeles Superior Court based on California's three-year statute of limitations, which barred Michaels' 1995 fraud and

misrepresentation claims, and California's two-year statute which barred his rescission and unjust enrichment claims. The trial court concluded that the statutes began to run in August and September of 1992, when Michaels suspected he had been defrauded. It therefore held that the causes of action were time-barred. (App. D 7). At the hearing, the trial court had observed there was also an interesting anomaly because, based on the date the action was originally filed in federal court, California's "five year rule" for bringing cases to trial had been exceeded. (App. E 4). Cal. Civ. Proc. Code § 583.310 (West 1984).

The trial court rejected Michaels' equitable tolling argument under California law because he had not shown he diligently pursued his claims, he was left without a judicial forum due to forces outside his control, and the defendant would not be prejudiced by the tolling:

> . . . plaintiff initially chose both his method of remedy and his forum. Plaintiff likewise chose to voluntarily withdraw [this] very remedy . . . Whatever predicament the plaintiff now finds himself in can only be laid at his own doorstep. (App. D 5).

The trial court agreed with Wildenstein Co.'s argument that Michaels' "'voluntary tactical decisions multiplied the number of actions and compounded rather than lessened the costs to courts of handling this dispute. Equitable tolling should not be applied to reward a plaintiff whose own strategic choices created the undesirable consequences the doctrine was designed to avoid.'" (App. D 6-7).

Judgment was entered for Wildenstein & Co. on August 17, 1998.

C. Court of Appeal Proceeding

Michaels appealed. On March 30, 2000, the California Court of Appeal reversed the judgment, holding that the state law claims were tolled by 28 U.S.C. § 1367(d).[1] The Court of Appeal rejected Wildenstein & Co.'s challenge of the constitutionality of the tolling provision:

> We reject Wildenstein's assertion that . . . section 1367(d) . . . 'stands in opposition to principles of state sovereignty.' (App. A 12).

On April 14, 2000, Wildenstein & Co. timely petitioned the Court of Appeal for rehearing, which was denied on April 20, 2000. (App. B 1).

D. State Supreme Court Proceeding

On May 9, 2000, Wildenstein & Co. timely petitioned for review to the California Supreme Court, again raising the constitutionality argument. The petition was denied on June 14, 2000. (App. C).

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[1] Michaels did not raise 28 U.S.C. § 1367(d) in the Los Angeles Superior Court until he added it in a footnote to supplemental papers in opposition to Wildenstein & Co.'s summary judgment motion. Wildenstein & Co. also filed supplemental papers on the same date. Under California practice, these were the final pleadings. At the hearing, Michaels advised the trial court he was "not suggesting that the statute is binding on this Court." He said: "it is a factor that the Court can look to in determining if plaintiff acted in a reasonable fashion and in good faith." (App. E 3).

REASONS FOR GRANTING THE WRIT

I. THIS CASE, INVOLVING THE SUPPLEMENTAL JURISDICTION STATUTE, RAISES THE SIGNIFICANT ISSUE OF WHETHER CONGRESS, CONSISTENT WITH THE TENTH AMENDMENT, HAS THE POWER TO TOLL STATE STATUTES OF LIMITATIONS ON STATE CAUSES OF ACTION TO BE HEARD IN STATE COURT.

The removal statutes, 28 U.S.C. §§ 1441, 1446-1447, and the 1990 supplemental jurisdiction statute, 28 U.S.C. § 1367, are of central importance as the main thoroughfares between the federal and state court systems. Not surprisingly, this Court has been called upon to review the removal statutes a number of times. *See, e.g., City of Chicago v. International College of Surgeons*, 522 U.S. 156, 174 (1997) (discussing removal, supplemental jurisdiction and abstention); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988) (discussing pendent claims). The supplemental jurisdiction statute not only expands the scope of federal jurisdiction; the sweep of its tolling provision in subsection (d) goes beyond the federal court system. The tolling period applies to purely state-law created causes of action to be heard in both federal and state court regardless of whether they are time-barred under state law.

As argued below, the Constitution does not give Congress the power to interfere in the states' ability to enact statutes of limitations for state-created causes of action, determine when an action is deemed commenced, enact service rules, decide whether to prescribe equitable tolling periods, create revival

doctrines, or enact related rules specifying the time limit for bringing an action to trial. These are state policy and lawmaking decisions of the most fundamental type for a state as a sovereign, ones by which the states govern their own laws and courts and define themselves as sovereign political entities.[2] Because subsection (d) of the supplemental jurisdiction statute encroaches on this key area, the constitutional issue presented by this petition is far-reaching.

A. Setting And Tolling Statutes of Limitations On State-Created Causes of Action Are Sovereign Functions Of State Government.

The states retain "'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918 (1997) (citation omitted). "[I]f there is any attribute to sovereignty left to the states, it is the right of their legislatures to pass, or not to pass, laws." *Maryland v. EPA*, 530 F.2d 215, 225 (4th Cir. 1975), *vacated and*

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[2] In addition to California, *see e.g., Hull v. Central Pathology Service Medical Clinic*, 28 Cal.App.4th 1328 (Cal. App. 1994), many states have adopted equitable tolling rules which protect plaintiffs who suffered delay despite their best efforts; they do not operate to excuse delay that was of the plaintiff's own making. *See, e.g. Dayhoff v. Temsco Helicopters*, 772 P.2d 1085 (Alaska 1989); *Hogogai v. Kadota*, 145 Ariz. 227, 700 P.2d 1327 (Ariz. 1985); *Telegraph Sav. & Loan Ass'n v. Schilling*, 105 Ill.2d 166, 473 N.E.2d 921 (Ill. 1984), *cert. denied*, 474 U.S. 1070 (1985); *Torres v. Parkview Foods*, 468 N.E.2d 580 (Ind. Ct. App. 1984); *Harrison v. Chance*, 244 Mont. 215, 228, 797 P.2d 200, 208 (Mont. 1990); *Galligan v. Westfield Centre Serv.*, 82 N.J. 188, 412 A.2d 122 (N.J. 1980).

remanded for consideration of mootness sub nom., EPA v. Brown, 431 U.S. 99 (1977) (per curiam). In areas where the Constitution has not empowered Congress to act, "state law must govern because there can be no other law." *Hanna v. Plumer*, 380 U.S. 460, 471-472 (1965).

Because the states have a sovereign right to make their own laws, subsection (d) of 28 U.S.C. § 1367 has stirred questions about its validity. *See, e.g.*, Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* § 2.161.2 (The Rutter Group 2000) (observing that "[s]ection 1367(d)'s validity would appear to depend on discerning a legitimate federal interest . . . . It is not clear what federal interest is served by tolling *a state* law statute of limitations on *state* law claims in *state* courts! The issue will have to be resolved by future case law"); Brian A. Beckcom, Note, *Pushing The Limits of the Judicial Power: Tolling State Statutes of Limitations Under 28 U.S.C. § 1367(d)*, 77 Tex.L.Rev. 1049 (1999) (arguing that subsection (d) exceeds Congress' authority under Article III of the Constitution and improperly invades the sovereignty of the states). In view of the federal and state courts' day-by-day application of this pivotal jurisdiction statute, the constitutionality of subsection (d) should be swiftly resolved.

The supplemental jurisdiction statute was designed to "provide the federal courts with statutory authority to hear supplemental claims." H.R. No. 101-734, *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874. The implication of 28 U.S.C. § 1367(d) for state courts, federal courts, defense attorneys and their clients is disturbing, however. If a plaintiff does not pursue her federal lawsuit diligently, or worse, does not

pursue it in good faith and with reasonable conduct (or, worst of all, engages in forum shopping),[3] she can still refile her state causes of action in state court. The state statute of limitations will be tolled regardless of the plaintiff's behavior. Subsection (d) renders the states powerless to provide for a different result. This point is illustrated by the present case. Michaels' lawsuit against Wildenstein & Co. languished in federal court for well over two years, only to be dismissed when he finally admitted he could not provide factual support for his two theories of federal jurisdiction. Subsection (d) permitted his state causes of action to proceed in state court even though the California statutes of limitations had expired, the state's requirements for equitable tolling were not satisfied, and the state's "five year rule" for bringing cases to trial had been exceeded.

When a federal statute covers the point in dispute, the statute may have force only if it represents a valid exercise of Congress' authority under the Constitution. *See Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988). As outlined below, Congress overstepped its legislative powers when it created subsection (d) of 28 U.S.C. § 1367.

This Court has long recognized that statutes of limitations on state causes of action are fundamental to a state's "well-ordered judicial system." *See, e.g., Board of Regents, University of New York v. Tomanio*, 446 U.S. 478, 487-488 (1986) (holding that state statute of

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[3] This gamesmanship is a common tactic, unfortunately. *See, e.g., Zagano v. Fordham Univ.*, 900 F.2d 12, 13 (2d Cir. 1990); *Durham v. Florida E. Coast Ry. Co.*, 385 F.2d 366 (5th Cir. 1967).

limitations and tolling rule applied in civil rights action under 42 U.S.C. § 1983). "'In virtually all statutes of limitations the chronological length of the limitation period is *interrelated* with provisions regarding tolling, revival, and questions of application.'" *See Tomanio*, 446 U.S. at 485-486 (emphasis added) (citation omitted). A statute of limitations is not a mere technicality, but often includes the state's wisdom on the proper balance of a complex consideration of limitations and tolling provisions. State tolling rules in particular are not islands unto themselves; tolling rules are integral parts of statutes of limitations; statutes of limitations are integral parts of state-created rights. *Id.* at 487-488. This Court stated that considerations of federalism are appropriate in adjudicating suits based on the federal civil rights statute, 42 U.S.C. § 1983. *Id.* at 492. The Court explained, however, that a judicial rule which adopted the state statute of limitations, but rejected the tolling "rule actually chosen by the [State] Legislature" in favor of an ad hoc federal rule, "can scarcely be deemed a triumph of federalism." *Id.*

Throughout its history, this Court has consistently analyzed state rules governing when an action is deemed commenced, service rules, tolling rules and statutes of limitations as inseparable components of the states' judgment on the proper balancing of the competing policy interests of repose and prosecution of claims on the merits. It is these policy aspects which make the specific state law requirements part and parcel of the statute of limitations. *See, e.g., Walker v. Armco Steel Corp.*, 446 U.S. 740, 751-752 (1980) (discussing service rule). The states are fully competent to legislate and adopt rules in the statute

of limitations and equitable tolling areas. The balancing of the state's diverse policy interests being the function of the state government, the Court has not allowed a federal system of weights and measures to replace a state one. To do so would upset the balance set by the states. In essence, the Court has followed a path of federalism which "leav[es] to the states the final decision on the bulk of day-to-day matters that can best be decided by those who are closest to them." *See generally* Henry J. Friendly, *Federalism: A Forward*, 86 Yale L.J. 1018, 1034 (1977).

When the state limitations period controls in federal court, either because it has been borrowed by federal law or the suit is a diversity suit, the Court has reaffirmed the significance of the interrelationship between state statute of limitations and the state tolling periods. The Court has found that the components of state law which qualify or abridge the cause of action must control as well. *See Hardin v. Straub*, 490 U.S. 536, 542 (1989) (holding that state tolling period applies in suit under 42 U.S.C. § 1983)[4]; *Walker*, 446 U.S. at 751 (holding that in diversity suit, state law governs the determination of when the action is commenced for tolling purposes).

The Court has acknowledged that a state law rule, such as a limitation period that would completely bar recovery in a suit if brought in state court, bears on a state-created right "vitally and not merely formally or negligibly." *Guaranty Trust Co. v. York*, 326 U.S. 99,

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[4] Under 42 U.S.C. § 1988, Congress determined that gaps in federal civil rights acts may be filled by state law, as long as state law is not inconsistent with federal law.

100 (1945) (holding that state statutes of limitations are substantive and binding for diversity jurisdiction purposes under *Erie R. Co. v. Tompkins*, 304 U.S. 34 (1938)). This Court also has recognized that the diverse rules which, as a whole, comprise the state's policy on the length of the limitation period are an integral part of the "measure" of the state-created cause of action. *See, e.g., Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). In *Ragan*, a diversity case, the Court held that a state law which defines the commencement of an action for purposes of applying the statute of limitations is an integral part of the state law and must be applied in adjudicating the action. The Court explained that "[w]here local law qualifies or abridges [the cause of action], the federal court must follow suit. Otherwise there is a different *measure* of the cause of action in one court than in the other, and the principle of [*Erie*] is transgressed." *Id.* at 533-534 (emphasis added). Because the cause of action was created by state law, the Court held that it carried the same burden and was subject to the same defenses in federal court as in state court: "We cannot give it longer life in the federal court . . . without adding something to the cause of action." *Id.*

Three years after *Tomanio*, this Court reaffirmed the significance of the interrelationship between state statutes of limitations and state tolling periods. In *Hardin*, the Court upheld the applicability of a state rule tolling a statute of limitations for prisoners in a case heard in federal court under 42 U.S.C. § 1983. *See Hardin*, 490 U.S. at 539, 542 (observing that Congress' tradition of borrowing analogous state statutes has been "based on a congressional decision to defer to

'the States judgment on the proper balance between the policies of repose and . . . enforcement embodied in the state cause of action'" (citation omitted.))

In *Walker*, a diversity case, this Court found *Ragan* "indistinguishable." The Court held that in an action arising under state law the federal court should follow the applicable state law, rather than Rule 3 of the Federal Rules of Civil Procedure, to determine when the action commenced for tolling purposes. The Court held there was no indication that Rule 3 was intended to "displace state tolling rules for purposes of state statute of limitations." *Walker*, 446 U.S. at 748, 750-751. The Court left open the issue of whether it would be beyond Congress' power under the Constitution to supply a federal rule, in a diversity case, to govern when a state statute of limitations begins to run. *See id.* at 752 n.14.

If *Walker* leaves open a constitutional question whether Congress can define the life-span of a state statute of limitations in a diversity case, there is a constitutional question whether it can define the end of the state statute by enactment of the tolling provision in 28 U.S.C. § 1367(d) for state causes of action while pending in federal court. There is an equally serious question as to Congress's power under the Constitution to toll the state statute of limitations on the state cause of action in the state court forum *after* the federal court dismissal.

Unlike Rule 3, subsection (d) of 28 U.S.C. § 1367 is expressly intended to control the issue of limitations tolling and thus displace inconsistent state law rules. This is a direct collision of federal and state law. Subsection (d) "add[s] something to the cause of action," *see Ragan*, 337 U.S. at 533-534, by giving it

new life even though the state which created the cause of action might reject it as time-barred. Subsection (d), therefore, is not merely a congressional regulation of the procedures to be followed in federal court when there is no conflicting state right protected by the Constitution, a regulation permitted by *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). Instead, subsection (d) is regulation of the substantive law to be followed both by federal courts and by state courts after dismissal of the federal action. This federal regulation markedly interferes with, and in fact usurps, the state government's right to balance the diverse and inseparable policy interests underlying limitation periods and equitable tolling rules on purely state law causes of action. Subsection (d) ties the hands of the state legislatures and judiciaries by forbidding the use not only of their own tolling rules, but of their own related statutes prescribing time limits to bring cases to trial.

Whatever may be the outer limits of state sovereignty, a core element of that sovereignty is, at the very least, state control over the creation and shaping of state law. *Erie*, 304 U.S. at 78 ("Congress has no power to declare substantive rights of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the laws of torts".) This state control includes specifying the elements of state-created causes of action. This control should also include the balancing of diverse policy interests on hearing these claims. If a state were not permitted to adopt its own equitable tolling rule, it might balance the competing interests of repose and prosecution of valid claims differently

and enact a different limitation period. The diverse interests weighed by the state cannot be unbundled.

The interrelationship analysis employed in *Tomanio* and *Hardin* is useful in determining whether subsection (d) intrudes in state autonomy. If a state's power to create causes of action and enact statutes of limitations is deemed a sovereign function, limitations periods being fundamental to a state's "well-ordered judicial system," *see Tomanio*, 446 U.S. at 487-488, then the decision to enact equitable tolling rules must be considered a sovereign function as well. So, too, is the enactment of related laws specifying when cases must be brought to trial. A corollary, no less significant, is the state's right to enforce its laws in its own courts as an independent sovereign government. If the Constitution were read otherwise, the states would be powerless to enact and enforce state laws governing such matters as taxes on land, the law of descent, trusts and estates, contracts, torts, insurance regulation, or rules of civil procedure and judicial review. *See FERC v. Mississippi*, 456 U.S. 742, 774-775 (1982) (Powell, J., concurring and dissenting) (questioning whether Congress could "pre-empt state rules of civil procedure and judicial review in classes of cases found to affect commerce").

Subsection (d) is a critical inroad on the states' independent status. If Congress can dictate a tolling period for state causes of action to be heard in federal court under supplemental jurisdiction or in state court thereafter, surely it can dictate when the cause of action accrues, the proper limitations period, revival rules, and also, for good measure, the rules of civil procedure to be applied in state court in deciding the claim on the merits and the rules for appellate

review. As stated by Judge Fernandez in his dissenting opinion in *Mack v. United States*, 66 F.3d 1025, 1035 (9th Cir. 1995), *rev'd, Printz v. United States*, 521 U.S. 898 (1997), "[t]he time to stop this journey of a thousand miles is at the first step." The constitutionality of subsection (d) should be determined promptly because the subsection impacts innumerable state law causes of action that will be heard by the federal or state courts.

The Framers of the Constitution recognized that the states had an independent sovereignty.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite .... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961) (J. Madison). The Framers were concerned that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, p. 301 (J. Madison).

Subsection (d) of 28 U.S.C. § 1367 represents an excessive accumulation of powers, one which prevents the states from discharging their ordinary functions of balancing diverse policy interests and making state law. Because "the erosion of state sovereignty is likely to occur a step at a time," *South*

Carolina v. Baker, 485 U.S. 505, 533 (1988) (O'Connor, J., dissenting), any infringement of state sovereignty should be of concern. As Professor Tribe has stated:

> Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions — in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday nothing is left but a gutted shell.

Laurence H. Tribe, *American Constitutional Law* 302 (1st ed. 1978).

This sortie made by subsection (d) into sovereign state lawmaking territory warrants swift review by this Court.

B. Subsection (d) Of 28 U.S.C. § 1367 Interferes With The Sovereign State Function Of Determining State Law.

"[T]he power to make decisions and to set policy is what gives the State its sovereign nature." *FERC*, 456 U.S. at 761. The constitutional protection of state sovereignty, moreover, is "for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). The power to make law is an incident of state sovereignty, a power possessed by every independent government. The tolling provision in subsection (d) of 28 U.S.C. § 1367 strikes at exactly this power.

Subsection (d) of the supplemental jurisdiction statute is a sharp intrusion on state lawmaking sovereignty, one which raises an important Tenth Amendment issue. Extending the life of a state-

created cause of action was considered impermissible in *Ragan*, a diversity case, because it would "add[] something to the cause of action"; it would change the "measure" of the claim, which must be "found in local law." *Ragan*, 337 U.S. at 533-534. In many instances, subsection (d) will breathe new life into a time-barred cause of action that was created by the state legislature and is to be heard in state court. This interference with the local, ultimately political decisions of enacting statutes of limitations and interrelated tolling rules for purely state causes of action impermissibly treads on sovereign state terrain.

Because of subsection (d), the states are no longer free to decide whether to adopt equitable tolling rules in order to control a plaintiff who may be less intent on obtaining a speedy trial than on selecting forums and making the litigation so protracted that the defendant will be forced to settle. Similarly, the states are no longer free to enforce strictly their limitations periods by requiring a plaintiff, who brings an action with a state claim in federal court, to file a parallel state claim in state court and seek a judicial stay from it in order to avoid litigating at risk.

In *Hanna v. Plumer*, 380 U.S. 460, 472 (1965), the Court held that "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it Congressional power to make rules governing the practice and pleading in those courts[.]" *Hanna* did not address whether Congress has the power, consistent with the Constitution, to make rules governing the practice and pleading on state causes of action to be adjudicated in state court. If "Congress' authority to

legislate a statute of limitations for diversity cases is not without doubt," *see* 19 Charles A. Wright, et al, *Federal Practice and Procedure* § 4509 at 266, n.17 (1996),[5] its power to toll state statutes of limitations on state causes of action to be heard in federal or ultimately state court is even more problematic.

Under the Constitution, "each state is sovereign within its own domain, governing its citizens and providing for their general welfare." *FERC*, , 456 U.S. at 777 (O'Connor, J., dissenting, joined by Burger, C.J. and Rehnquist, J.). Further, "[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Henry M. Hart, *The Relations Between State and Federal Law*, 54 Col.L.Rev. 489, 508 (1954). "Some differences in remedy and procedure are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered." *Id.* "If the differences become so conspicuous" as to require change, "the remedy does not lie in the sacrifice of the independence of either government." It lies rather in provision by the federal government of a "federal forum equally accessible to both litigants." *Id.*

The Constitution places limits on Congress' lawmaking role; some areas must be governed by

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[5] Even a defender of subsection (d) of the supplemental jurisdiction statute concedes that the "congressional power to establish the actual limitations period for a state law claim would clearly be lacking[.]" *See*, Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute – A Constitutional and Statutory Analysis*, 24 Ariz. St. L. J. 849, 988 (1992).

state law. In *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Court held that "Congress has no power to declare substantive rights of common law applicable in a State." "[T]here is no such thing as a power of inherent sovereignty in the government of the United States. It is a government of delegated powers, supreme within its prescribed sphere, but powerless outside of it." *Julliard v. Greenman* (*The Legal-Tender Cases*), 110 U.S. 426, 467 (1884). In *Hanna*, the Court stated that "[w]e are reminded by the Erie opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law." *Hanna*, 380 U.S. at 471-472.

This petition presents one such area where state law must govern. 28 U.S.C. § 1367(d) is an interference with the states' retained right to make state law on matters essential to their well-ordered judicial systems.

C. This Interference With State Law Violates Principles Of State Sovereignty Protected By The Tenth Amendment.

Subsection (d) of 28 U.S.C. § 1367 interferes with a system of "dual sovereignty" which is established by the Constitution, and against which federal legislation must be measured. *See Printz v. United States*, 521 U.S. 898, 918 (1997) (discussing "dual sovereignty"); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Subsection (d) steps well beyond the federal government's jurisdictional

boundaries. "'The States entered the federal system with their sovereignty intact.'" *Alden v. Maine*, 527 U.S. 706, 713 (1999) (citation omitted). The states are not "mere provinces or political corporations," *see id.* at 715, satellite offices of an all-powerful national government. Instead, "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

Because subsection (d) interferes with state lawmaking power, a quintessential attribute of sovereignty, it exceeds Congress' powers under Articles I and III of the Constitution, and infringes on retained states' rights in violation of the Tenth Amendment. "[I]f a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156 (1992). Subsection (d) is invalid under the Tenth Amendment, moreover, whether statutes of limitations and tolling provisions on state causes of action are regarded as substantive or procedural, or a combination. The state's power to enact law in this area is not subject to federal preemption. The Constitution does not grant Congress power to "declare substantive rights of common law applicable in a state," *Erie*, 304 U.S. at 78, nor power to decide procedural rules to be followed by state courts on state-created causes of action. "As is evident from its text . . . the Supremacy Clause enshrines as 'the supreme Law of the Land' only those federal Acts that accord with the constitutional design." *Alden*, 527 U.S. at 731; *Printz*, 521 U.S. at 924.

Subsection (d)'s encroachment into sovereign state territory also parallels, in major respects, the federal government's unconstitutional conscription of state legislatures to carry forward federal regulatory policy. *See Printz*, 521 U.S. 898; *New York*, 505 U.S. 144. The impact of subsection (d) is essentially the same as if Congress had commanded each of the state legislatures to enact provisions to toll the limitation periods on state causes of action while in federal court under supplemental jurisdiction and for 30 days after dismissal by that forum. Subsection (d) restrains the state legislatures in exactly this manner, even though its immediate impact is on the federal or state court judges who must apply the federal dictate. If it is unconstitutional to require state officials to enact or enforce a federal regulatory program, it is equally forbidden to usurp an area of state lawmaking sovereignty and require the states to adhere to a federal scheme of law if they wish to maintain their own judicial branch of government. What is infringed upon is as important as the mechanism used by Congress. Subsection (d) infringes on state sovereignty in the legislative and judicial areas, the power to craft equitable tolling periods for statutes of limitations on purely state causes of action. Subsection (d) also renders meaningless the states' related power to enact time limits for bringing a case to trial. This is terrain far removed from federal preemption. Violating the balance of federal and state powers reflected in the Constitution, subsection (d) commandeers the state lawmaking process.

This Court should grant the writ in order to uphold the core principles of state sovereignty

protected by the Tenth Amendment, principles which are abrogated by subsection (d) of 28 U.S.C. § 1367.

D. Subsection (d) Of Section 1367 Is Neither Necessary Nor Proper, In Violation Of Section 8 Of Article I Of The Constitution.

Because the tolling provision in subsection (d) of 28 U.S.C. § 1367 exceeds Congress' Article III power as an infringement on retained states' rights, it cannot be justified by the Necessary and Proper Clause in Article I, § 8, cl. 18. Congress cannot "pass laws for the accomplishment of objects not entrusted to the government," nor can it "adopt measures which are prohibited by the Constitution." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

The word "Necessary" in "Necessary and Proper" is broad, but the Clause is not an unlimited grant of authority. Instead, it is supplemental to other constitutional powers. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) at 414-415. This Court has interpreted "Necessary" to mean "useful," or "adapted to the [legislative] end." *Id.* at 419. While the threshold is rather low, Congress does not have unlimited power to decide what is useful or proper. *See* Gary Lawson & Patricia B. Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of The Sweeping Clause*, 43 Duke L.J. 267, 274, 329 (1993).

It is difficult to see how subsection (d), insofar as it governs a state court proceeding on a state-created cause of action, is "necessary" to any federal interest. *See* Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* § 2.161.2 (The Rutter Group 2000). If Congress felt

compelled to address tolling, it could have handled the subject in many other ways, all consistent with principles of dual sovereignty. Congress could have encouraged the state legislatures to adopt uniform tolling legislation. Congress could have provided in subsection (d) that a federal district court must condition the dismissal of the supplemental claim on the defendant's waiver of any limitations defense in a subsequent proceeding. Alternatively, Congress could have simply allowed the states to continue to govern equitable tolling on a state-by-state basis, not forcing them, as conscripts, to march to the beat of the federal drummer.

Even in states that strictly construe statutes of limitations, plaintiffs can stay proceedings pending the federal outcome. The tolling provision in subsection (d) is, therefore, not even useful to achieve its legislative end in the few states which have ostensibly declined to adopt tolling rules. In Missouri for example, a state that strictly construes its statutes of limitations, courts will stay a plaintiff's proceedings in state court pending the outcome of the same claims in federal court. *See Hill v. John Chezik Imports*, 797 S.W.2d 528, 530 (Mo. Ct. App. 1990) ("[i]n this case Appellant's state action could have been pending, but stayed, until outcome of the federal action"); *see also In re Estate of Mellon*, 314 A.2d 500, 503 (Pa. 1974) (recognizing propriety of stay in state proceedings during federal court litigation). New York has enacted a six month rule allowing the filing of a new action under certain circumstances after termination of the original suit. N.Y. Civ. Proc. Law § 205(a) (McKinney's 2000). These states, in their discretion, fashioned a remedy to the perceived

problem of prejudice. Accordingly, Congress' enactment of subsection (d) was not useful in any sense of the word.

Regardless of whether subsection (d) was "Necessary," it was not "Proper" under the Necessary and Proper Clause. In *Printz*, this Court explained that when a "'La[w] . . . for carrying into Execution'" the Commerce Clause violates the [constitutional] principle of state sovereignty[,] . . . it is not a "'Law . . . *proper*'" within the meaning of the Necessary and Proper Clause. *Printz*, 521 U.S. at 923-924 (citation omitted). The Constitution and federal statutes "do not harness state power for national purposes." *FERC*, 456 U.S. at 777 (O'Connor, J., dissenting, joined by Burger, C.J. and Rehnquist, J.). This harnessing of state power is exactly what Congress has attempted in subsection (d).

Congress' weighing of the benefits of subsection (d) to prospective plaintiffs does not allow the subsection to escape constitutional scrutiny. In *Printz*, which held unconstitutional a portion of a federal statute that conscripted states officers directly to enforce a federal regulatory program, the Court stated: "no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *See Printz*, 521 U.S. at 935. Subsection (d) offends the very principle of state sovereignty; accordingly, a balancing analysis is not appropriate.

II. THE CASE ALSO RAISES THE SIGNIFICANT ISSUE OF WHETHER THIS FEDERAL TOLLING PROVISION CONTRAVENES THE RIGHT OF THE PEOPLE OF EACH STATE TO PASS THEIR OWN LAWS, AND THUS VIOLATES THE GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT IN SECTION 4 OF ARTICLE IV OF THE CONSTITUTION.

"[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. at 157. The states' retained sovereignty is reflected in the Constitution's many facets, including the Guarantee Clause, Article IV, § 4. *See id.*

The Guarantee Clause "'presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights.'" *Printz*, 521 U.S. at 919 (citation omitted). The Guarantee Clause provides that the United States shall "guarantee to every State" a "Republican Form of Government." At its core, the Guarantee Clause protects the right of the people of each state to "choose their own officers for governmental administration," and to "pass *their own laws* in virtue of the legislative power possessed in representative bodies." *In re Duncan*, 139 U.S. 449, 461 (1889) (emphasis added).

Nothing in the Constitution suggests that the states, which generally regarded the setting of statutes of limitations as within the forum state's legislative jurisdiction, were of the mind to surrender

that discretionary power to a newly-formed federal government. At the time the Constitution was adopted, each state could enact its statute of limitations as a question of local policy and regulation. In *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725-726 (1988), this Court held that a forum state was free to apply its own statute of limitations to claims governed by the substantive law of other states despite the Full Faith and Credit Clause. The Court explained that the society which adopted the Constitution regarded statutes of limitations as "procedural restrictions fashioned by *each jurisdiction* for its *own courts*." *Id.* (emphasis added).

Regardless of its goals, subsection (d) of 28 U.S.C. § 1367 is an infringement on the sovereign right of the state legislatures and courts, in their own wisdom, to enact statutes of limitations and adopt equitable tolling periods for state causes of action. In responding to the question, "Who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union," Alexander Hamilton foresaw the broad constitutional issue presented by this petition:

> The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any State, would it not be evidence that in making such an attempt it had

exceeded its jurisdiction and infringed upon that of the State?[6]

Subsection (d) brings to life Hamilton's concern over federal legislation that intrudes on state lawmaking sovereignty. State tolling periods on state-created causes of action remain an inseparable policy element of statutes of limitations, which in turn are fundamental to a state's "well-ordered judicial system," *Board of Regents, University of New York v. Tomanio*, 446 U.S. 478, 487 (1986).

Subsection (d) of 28 U.S.C. § 1367 upsets the balance between the powers of the federal and state governments. Only this Court's intervention can restore that essential balance which is protected by the Tenth Amendment and Article IV, § 4 of the Constitution.

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant a writ of certiorari in this case.

Respectfully submitted,

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[6] *The Federalist* No. 33, pp. 203-204 (A. Hamilton).